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BEFORE THE
Federal Communications Commission
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:

Digital Audio Broadcasting Systems
And Their Impact on the Terrestrial
Radio Broadcast Service

MM Docket No. 99-325

ORIGINAL

To: The Commission

COMMENTS OF WPNT, INC.

WPNT, Inc. ("WPNT"), the licensee of WLTJ(FM), Pittsburgh, Pennsylvania, respectfully submits these comments ("Comments") in the above-referenced proceeding, in response to the Joint Comments (the "Joint Comments") filed by The Livingston Radio Company ("Livingston") and Taxi Productions, Inc. ("Taxi") and the recent *ex parte* presentations to the FCC staff by Livingston. The Joint Comments propose to use this proceeding, concerning the introduction of in-band, on-channel ("IBOC") digital FM technology, to end the grandfathered status of certain Class B FM stations. WPNT submits that the proposal would disserve the public interest, by eliminating long-established FM service from grandfathered stations, and unfairly benefit one group of stations at the expense of others. In any event, such a radical restructuring must not be undertaken lightly. At the very least, it warrants a more thorough record than private benefits to just two individual stations. Indeed, all interested parties must have an opportunity to comment before any action is taken, including the listeners of grandfathered FM stations who could be deprived of service.¹

¹ To the extent necessary, WPNT seeks leave to file these comments now and submits that there is good cause for the Commission to fully consider them. On September 8, 2004, Livingston met with FCC staff members, making both oral and written *ex parte* presentations that, for the first time, specifically identified WLTJ as a station that should be required to reduce power. See letter from Peter Tannenwald, Esq., to Marlene H. Dortch, Report of *Ex Parte* Communications, MM Docket No. 99-325, September 8, 2004 ("Livingston Ex Parte Presentation"). Neither

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WPNT is the licensee of WLTJ(FM), Pittsburgh, PA. WLTJ is a Class B station, but has long been authorized by the Commission to operate with 47 kW of effective radiated power (“ERP”) at 271 meters height above average terrain (“HAAT”). Pursuant to Section 73.211 of its rules, the Commission no longer authorizes new Class B stations to operate with greater than 50 kW ERP at 150 meters HAAT (or the equivalent thereof), but stations authorized prior to March 1, 1984, such as WLTJ, have been permanently grandfathered to continue operating as they were authorized. 47 C.F.R. § 73.211(b)(1) & (c).

As noted above, The Joint Comments do not address any of the specific issues related to the implementation of IBOC upon which the Commission has sought comment in this proceeding. Rather, the Joint Comments seek to use this proceeding to end the grandfathered status of Class B FM facilities once they implement IBOC technology. Taxi and Livingston argue that their proposal will “restore an orderly balance” to the FM broadcast band and allow two of their individual stations to improve their coverage. The Livingston *Ex Parte* Presentation listed some 68 Class B FM stations that are reportedly grandfathered pursuant to Section 73.211(c), including WLTJ, but did not indicate any stations, other than their own, that would purportedly benefit from the change, or the extent of any such benefits.

The Joint Comments argue that, while there “may have been” good reason to grandfather certain FM stations when the Commission revised its power limits and other technical rules in 1962, those justifications should no longer prevail. On the contrary, WPNT submits that the

the Notice of Proposed Rulemaking nor the Further Notice of Proposed Rulemaking in this proceeding sought comment on the specific rule change sought by the Joint Comments. *In the Matter of Digital Audio Broadcasting Systems and Their Impact on the Terrestrial Radio Broadcast Service, Notice of Proposed Rule Making*, 15 FCC Rcd 1722 (1999) (“NPRM”); *Further Notice of Proposed Rule Making and Notice of Inquiry*, 19 FCC Rcd 7505 (2004) (“FNPRM”).

FCC's original rationale carries even greater weight today.² In the *1962 FM Order*, the Commission rejected calls by a tiny minority of commenters for an overall reduction in Class B facilities in the northeast United States and California because, *inter alia*: (1) existing audiences would lose valuable service from FM stations; and (2) only "small gains" from new allotments "could result." The Commission concluded that "[u]pon the limited showing by the few parties supporting reduction, we would not be justified in taking such action, either for reasons of competition or benefit to the operation of possible new or other existing stations."³

Once again, only a tiny minority of the comments filed in this proceeding has suggested a forced power reduction on grandfathered Class B FM stations operating with IBOC technology. Indeed, the present proceeding does not even involve FM allotment matters or FM station classifications. If the Commission were to adopt the Joint Comments' proposal, certain listeners of grandfathered Class B FM stations would lose the radio service upon which they have come to rely. The FM service that was grandfathered in 1962 to avoid disruption has now continued for over 40 more years, and the populations served by these stations have likely grown. As the Commission recognized in this proceeding, "the interests of listeners are paramount."⁴ Moreover, the Commission and courts have long held that loss of *existing* broadcast service is "*prima facie* inconsistent with the public interest."⁵ To offset these service losses, the Joint

² See *In the Matter of Revision of FM Broadcast Rules, Particularly as to Allocation and Technical Standards, Second Report*, 40 FCC 720 (1962) ("*1962 FM Order*").

³ *Id.* at ¶13.

⁴ *FNPRM* at ¶17.

⁵ *New Jersey Public Broadcasting Authority*, 74 FCC 2d 602 (1979) at ¶ 7; *Hall v. FCC*, 237 F. 2d 567, 572 (D.C. Cir. 1956) ("That such a curtailment of service is not in the public interest is axiomatic"). Thus, for example, the Commission will protect existing full power FM service from new FM translator interference even outside the FM station's protected contour. 47 C.F.R. § 74.1204(f).

Comments have offered no more than a limited showing of benefits to just two stations in support of the proposed rule change.⁶

The Joint Comments argue that allowing Class B FM stations to remain grandfathered after introducing IBOC would “discriminate against small businesses,” which they claim “are more likely” to operate Class A stations than grandfathered Class B stations. They argue that the Commission has failed to “distinguish between large and small radio stations” in assessing the impact of IBOC proposals.⁷ Contrary to their assumption, WPNT is a family-owned company that operates just two radio stations, WLTJ and WRRK(FM), Braddock, Pennsylvania.⁸ Indeed, WLTJ’s grandfathered status enables that family-owned business to better compete against the large group owners in the Pittsburgh market. The Joint Comments do not explain why a family-owned business such as this one should be forced to reduce its coverage area of more than forty years, removing long-established service to listeners. They point to no other operator, large or small, that would allegedly benefit from a mandated reduction in service from WLTJ. In any event, the Joint Comments’ assumption that the owners of grandfathered FM stations necessarily are large conglomerates unworthy of grandfathered status is not only unsupported, it is simply wrong.⁹

⁶ WPNT understands that the Commission previously denied a modification application filed by Livingston to increase power and coverage, because it was short-spaced to other stations. *The Livingston Radio Company*, 10 FCC Rcd 574 (1994). It appears as if Livingston, in its present comments, may be seeking to effectuate an upgrade of its particular station by general rulemaking, after failing to do so by modification application.

⁷ Joint Comments at 6.

⁸ The *FNPRM* notes that the Small Business Administration defines a radio broadcasting *station* with under \$6 million in annual receipts as a “small business.” See *FNPRM* at Appendix A, ¶ 90. Station WLTJ itself would appear to qualify. Thus, using the Joint Comments’ terminology, WLTJ is a “small station.” Although WPNT, with aggregate revenue from two radio stations, would not appear to meet the SBA definition, it is hardly a “large” business.

⁹ Moreover, the owner of Taxi, one of the most famous and successful entertainers in the world, is hardly a typical “small business owner.”

The rule change sought by the Joint Comments would not end “discrimination” against their stations, but rather provide Livingston and Taxi with an economic windfall at the expense of other broadcasters. The Joint Comments’ proposal would very likely increase the market value of their own stations, by increasing their coverage, while decreasing the market value of the grandfathered FM stations forced to reduce coverage. Neither Livingston nor Taxi claims to have owned its affected Class A station at that time the Commission authorized the relevant Class B stations affecting them, or even at the time the Commission decided to grandfather those Class B stations. Presumably, each of them paid a purchase price for the station at issue reflecting its current facility and coverage, just as the owners of the grandfathered Class B stations paid a purchase price reflecting the facilities authorized for their own stations. Of course, Taxi and Livingston could now seek a private agreement with the Class B stations affecting them to reduce power, subject to FCC approval if that change would serve the public interest as well as their own interests. But they should not expect the Commission to force a group of grandfathered stations to reduce power for their own private economic benefit.

In any event, however, such a radical change in the FCC rules and restructuring of the FM industry should not be undertaken lightly. Nor should it be undertaken without a more thorough record with respect to the specific rule change sought. In this proceeding, the Joint Comments have not shown any benefits to particular stations they do not own. As explained above, their assumption that grandfathered Class B stations are owned by large businesses is not only unsupported, but erroneous. Moreover, the Joint Comments do not address the Commission’s significant concern in the *1962 FM Order* that a forced reduction in power could result in the inability of some grandfathered FM stations to cover their cities of license with the requisite strength of signal. Indeed, the Commission has sought comment in this proceeding on

how new digital technology could foster *better service* to a station's local community of license.¹⁰ A rule change cannot be adopted that might disserve that goal. In short, all interested parties must have a full opportunity to comment before any change is adopted, including the listeners of grandfathered FM stations, and a complete record must be compiled before such a change can even be considered.

As a legal matter, the Commission cannot adopt the Joint Comments' proposal without further public notice and the opportunity for additional comment. To effectuate that proposal, the Commission would be required to amend Section 73.211(c) of the FCC rules, which grandfathers the Class B stations at issue. However, neither the *NPRM* nor the *FNPRM* in this proceeding proposed or sought comment on the specific modification of that rule. The Administrative Procedure Act does not permit the FCC to modify an existing rule without providing legal public notice of the proposed change.¹¹

Nor is the current proceeding the right venue to consider such station-specific issues. As iBiquity has commented, the Commission should "refrain from developing rules of general applicability" based on the interference concerns of just a few stations.¹² If the Joint Comments' proposal merits consideration, it should be addressed in a future proceeding that will not delay the implementation of IBOC by all FM broadcasters. As set out above, however, the Joint Comments have not demonstrated that their proposal would serve the public interest and warrant such an additional proceeding.

¹⁰ *FNPRM* at ¶ 33.

¹¹ 5 U.S.C. § 553(b)(3). See also *Prometheus Radio Project v. FCC*, 2004 U.S. App. LEXIS 12720 (3d Cir. 2004) at 76-78.

¹² Reply Comments of iBiquity Digital Corporation at 4.

For the reasons set forth herein, WPNT respectfully submits that the Commission must not adopt the proposal made in the Joint Comments, to end the grandfathered status of certain Class B FM stations, in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Genet Teferi, a secretary at the Law firm of Fleischman and Walsh, L.L.P., hereby certify that copies of the foregoing "Motion For Leave To File And Comments Of WPNT, Inc." were served this 21st day of October, 2004, via first class mail, postage prepaid, upon the following:

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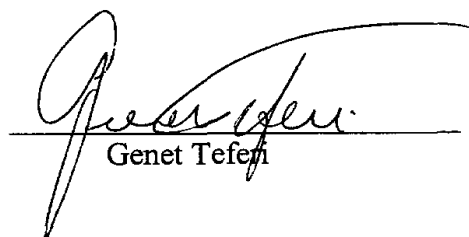
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